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IN THE

Supreme Court of the United States

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L. K. PETERSON,
CREDIT FINANCE COMPANY,
CONGRESS INVESTMENT COMPANY, INC.
AND ALAMO FINANCE COMPANY, INC.

Petitioners,

v.

HERBERT E. THARP,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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PETITIONERS L. K. PETERSON, CREDIT FINANCE COMPANY, CONGRESS INVESTMENT COMPANY, INC., AND ALAMO FINANCE COMPANY, INC. pray that a writ of Centiorari be granted to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered February 1, 1962, said opinion and judgment affirming the judgment of the United States District Court for the Southern District of Texas, at Houston, Texas, which rendered a money judgment in favor of respondent and against petitioners.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in Cause No. 18,807, entitled L. K. Peterson, Credit Finance Company, Congress Investment Company, Inc., and Alamo Finance Company, Inc. v. Herbert E. Tharp, is reported in 299 Fed. 2d 434, and a true copy of such opinion is Appendix A to this petition.

The reported portion of the opinion of the United States District Court for the Southern District of Texas, Houston Division, in Cause No. 10,536, entitled Herbert E. Tharp, v. L. K. Peterson, Credit Finance Co., Congress Investment Co., Inc. and Alamo Finance Co., Inc., appears in 202 F. Supp. 80, and a true copy of such reported material is Appendix B to this petition.

JURISDICTIONAL GROUNDS

The grounds on which the jurisdiction of the Supreme Court is invoked are that the United States Court of Appeals for the Fifth Circuit has decided important state law questions in a way in conflict with the applicable state law of the State of Texas, and, further, that the Court of Appeals has so far sanctioned a departure from the accepted and usual course of judicial proceedings by the United States District Court in this case, as to call for an exercise by the Supreme Court of its power of supervision.

(1) The judgment of the United States Court of Appeals hereby sought to be reviewed was entered February 1, 1962.

(2) Order denying Petition for Rehearing (without written opinion) was entered by the United States Court of Appeals in this case on May 15, 1962.

(3) The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment of the United States Court of Appeals in this case by

writ of certiorari is Title 28, United States Code, Section 1254, the pertinent portion of which is Appendix C to this petition.

QUESTIONS PRESENTED

1. The Court of Appeals has erred in holding that the defense of illegality (in that the partners were engaged in day-to-day violation of the Texas laws forbidding usury) would not operate to deny to Tharp a partnership accounting, such holding being contrary to the expressed laws of the State of Texas.

2. The Court of Appeals has erred in failing to reverse (or even to discuss or justify) the trial court's holding, in effect, that a partner may not at his will terminate the partnership. Such holding is effected by the trial court's judgment terminating the partnership in 1961, and granting an accounting up to September, 1960, 3½ years after Peterson by letter terminated the partnership in February, 1957. Such holding is contrary to the laws of the State of Texas.

3. The Court of Appeals has erred in holding that the trial court's findings are supported by the evidence when the uncontradicted *evidence of Tharp* is to the contrary, with reference to the finding that Tharp had no knowledge of the liquidation of Model and the diversion of business to other entities until November, 1956, Tharp testifying that he knew in December, 1953, of such liquidation and diversion of business.

4. The Court of Appeals has erred in sanctioning the conduct of the trial court in granting damages for conversion in the guise of partnership accounting, based on a formula that is admittedly a guess and unsupported by the evidence, and in the total absence of evidence of value of assets so converted. This constitutes such a radical depart-

ure for usual and accepted course of judicial proceedings as to invite injustice, and requires the exercise of the Supreme Court's power of supervision.

CONSTITUTIONAL PROVISIONS, STATUTES, ETC., INVOLVED

A consideration of the questions herein presented will include an examination of the Constitution of the State of Texas, Aticle XVI, Section II, and of the Revised Civil Statutes of the State of Texas, Articles 5069, 5070, and 5071. The text of these pertinent provisions is appended hereto as Appendix D.

STATEMENT OF THE CASE

Basing jurisdiction upon diversity of citizenship, Tharp sued Peterson and other petitioners for an accounting of the partnership known as Model Investment Co., which had engaged in the small loan business in Houston, Texas, and for damages for assets or profits allegedly earned or acquired resulting from the fraudulent use or conversion of Model's assets and diversion of its business. Peterson and Tharp had been in partnership in various companies, all in the loan business, both in Alabama and in Texas, and at the beginning of the year, 1953, they agreed upon a "swap-out" whereby Tharp acquired the Alabama businesses and Peterson acquired the Texas businesses, except that the partners continued to own as a partnership the business known as Model in Houston, Texas, which then had a net worth of $56,401.09. Peterson continued to direct the affairs of Model and also operated his competitive businesses. In late 1953, Peterson created a new loan office and commenced to liquidate Model by collecting out loans and referring the bulk of new business to the new business; some business was

also diverted to his competitive business. Large withdrawals from Model were made and evenly distributed to the partners. Tharp admits, being aware in December, 1953, that the business of Model was being liquidated and was then aware that Peterson had created Credit Finance Co. and that the bulk of the business was being diverted to Credit while Model was being collected out, but did not object or even say anything about this set of facts to his partner, assuming that Peterson was reducing Model's net worth in order that the partners would be in position for one or the other to buy the entire interest in Model. Tharp says he sued in 1957 after he had come to the conclusion that Peterson did not intend to buy him out, and after the net worth of Model had been drastically reduced. Using rounded-off figures the financial picture of this business appears without dispute to be:

Net value 1-1-53	$56,000.00
Profits 1953-1957	26,000.00
	82,000.00
Cash distributed to partners	69,000.00
New worth end 1957	13,000.00

It is further without dispute that the purpose of these businesses was the loaning of money with the intent and purposes that the charges for the use and detention of the money be in excess of 10% per annum, a lesser return being insufficient for a profitable operation in view of losses and overhead. An examination of the above figures, considering that business ceased in February, 1957, and further considering the additional cost of liquidation (admitted by both parties to be expensive and costly), reflects an average profit on investment in excess of 10%

The case was tried to the court without a jury in March, 1960. The trial court, by its letter opinion stated:

> "It is very difficult for the Court to arrive at the respective interests of the two partners in the new finance companies, but in an effort to be fair, the Court apportioned the valuation of the new businesses on the basis of fifty per cent for management, and fifty per cent for partnership assets, which, would give the plaintiff Herbert E. Tharp a twenty-five per cent undivided interest in each of the three new companies, to-wit, Credit Finance Company, Congress Investment Company, Inc., and Alamo Finance Company.
>
> Therefore, judgment will be rendered for the plaintiff for one-half of the proceeds or undivided assets, of Modern Finance Company, and in a twenty-five per cent interest in the Credit Finance Company, the Congress Investment Company Inc., and the Alamo Finance Company, subject to L. K. Peterson receiving credit for his total capital investment."

The Court then appointed a firm of auditors to arrive at a figure based upon the above formula. The auditors conducted no hearings but did audit the books of the companies involved and filed their report, which, with minor corrections, was adopted as the basis for the money judgment rendered.

It is undisputed that Tharp invested no money into any business but Model, and that he never had any interest by contract in any of the corporate businesses. No evidence appears in the record as to the value of any asset allegedly converted by Peterson or the corporate petitioners. It is admitted that Peterson, in February 1957, immediately after suit was filed, wrote to Tharp dissolving their partnership; the judgment of the Court adopts an accounting as of September, 1960, giving Tharp an interest in profits and assets as of that time, and said judgment thein proceeds to dissolve the partnership.

ARGUMENT

In holding that the defense of illegality will not defeat Tharp's right to partnership accounting, the Court of Appeals relied on a number of cited case. The Texas Supreme Court case of *Wiggins* v. *Bisso*, 47 S.W. 637, clearly distinguishes of the cases relied on, those of *Brooks* v. *Martin*, 69 U.S. 78, *Pfeuffer* v. *Maltby*, 54 Tex. 454 and *DeLeon* v. *Trering*, 49 Tex. 68. The Texas case of *Ariaza* v. *Chapa*, 319 S.W. 2d 742, in which the Texas Supreme Court declined to entertain writ of error, is on all fours with the facts in the instant case and expressly denies to a plaintiff partner to an illegal venture any recovery either by way of partnership accounting, or recovery on account stated, or recovery by imposition of a trust on property purchased with partnership funds. The statutes and constitutional provision contained in Appendix D clearly proclaim the charging of usury to be contrary to the public policy of the State of Texas, and the rate charts which both parties admit were used, clearly reflect that the businesses were engaged in the business of loaning money for usurious interest. A partner in such an illegal business may not have an accounting from his co-partner by Texas law. The holding of the Court of Appeals is to repeal this established state law.

The partnership agreement of Peterson and Tharp contained no provision for termination or dissolution and no provision as to term or duration of the partnership. Under the Texas law, such a partnership is a partnership at will, and any partner may dissolve it at any time. *Wright* v. *Ross*, 30 Tex. 307, *Ware* v. *Chatham*, 56 S.W. 2d 229. Further, the accountability of a partner upon dissolution or breach of the partnership agreement extends only to such property as the firm had acquired before the dissolution and such profits as it had then made. *White* v. *McNeil*, 294 S.W. 928. Upon the filing of the lawsuit, Peterson by letter

terminated the partnership in February, 1957. Yet the trial court ordered an accounting as of September, 1960, and awarded damages as reflected by the report of the auditors reflecting condition of the books as of September, 1960, and terminated the partnership by its judgment of January, 1961. This had the effect of awarding Tharp an interest in Peterson's businesses' earnings for 3½ years after the partnership had been terminated, without investment by Tharp, and 3½ years after the last possible conversion of any partnership asset. What the trial judge would have done had trial been delayed another 5 years provokes the imagination. The manifest injustice resulting from this disregard of the law is noted in the consideration that Tharp, whose partnership interest at the beginning of 1953 was approximately $28,000.00, has received approximately $34,500.00, is entitled, at most, to $6,500.00 being ½ of the remaining assets of Model, and receives from the trial court the staggering sum of over $82,000.00. Though this point was before the Court of Appeals, its opinion is silent thereon.

The trial court found that Tharp was innocent of knowledge of the violation of his rights until sometime in November, 1956, long after the reduction of net worth of the partnership business had been accomplished by the diversion of business, and the Court of Appeals has held that these findings are supported by the evidence. The testimony of Tharp, however, would appear not to support these findings in his favor:

"Q. Then at that time (December, 1953) you were aware that loans or customers were being transferred from Model to Credit?

A. Yes, sir. (II Tr. 442)

Q. You were aware in 1953, December, that there was a partial liquidation occurring, were you not, sir?

A. Yes, the outstanding was dropping.

• • •

Q. Those remittances considerably exceeded the profits that were made on loans during those months, isn't that correct, sir?

A. Yes, sir.

Q. To the extent that the remittances exceeded profits, they represented a withdrawal of the partners' capital in that business.

A. Yes, sir. (II Tr. 452)

Q. Then that consequently would serve to reduce the net worth of the business by withdrawing the capital?

A. Yes, sir.

• • •

Q. And from December, 1953, until February, 1957, when this suit was filed, you never did discuss this with Mr. Peterson with respect to voicing any objection to the reduction of the net worth of that business, did you sir?

A. No, sir. (II Tr. 453)

Thus, it clearly appears that Tharp knew that another loan office had been created by Peterson to which partnership business was diverted, that remittances of profit and capital were being made thereby liquidating the business, and that he knew this shortly after the same was done in December, 1953. Yet by his suit and his argument he would claim not to have known of the violation of his "rights" until November, 1956, shortly before the suit was filed. The trial court has so held and the Court of Appeals somehow finds support for this finding, and the view of both courts is in the face of the facts which Tharp candidly admits. For Tharp to know the facts, object not, collect more money than the value of his partnership interest, and then claim damages for fraud seems extreme until it is contrasted with the act of the court in honoring his claim and awarding him more than twice as much more and justifying such award by a

finding contrary to and in the face of facts which Tharp himself admits to be true.

Petitioners are aware that this Court will not concern itself with just any violation of a litigant's rights, especially when questions of the civil law of a State are so closely involved. But when a United States District Court disregards the law, adopts arbitrary standards not found in the law and in the evidence, and in so doing arrives at a result which shocks the imagination in its extreme unreality, the judicial processes of the United States have failed and revision by appellate tribunals is required to restore them. If the Court of Appeals fails to take this action, but, instead sanctions the sacrifice of law to a trial judge's concept of Solomon-type justice, then, it is submitted, a substantial federal question is involved. This Court has been most assiduous in protecting the civil rights of citizens in all courts, even municipal courts, and should not be less concerned with a disregard of a civil litigant's right to a fair trial in a District Court of the United States according to law and not to the caprice of the judge.

Accordingly, it is respectfully prayed that the writ of certiorari be issued in this case in order that revue of the opinion and judgment of the Court of Appeals be had and substantial error be corrected.

Respectfully submitted

Ellis F. Morris

Ellis F. Morris

William H. Scott, Jr.

William H. Scott, Jr.

Attorneys for Petitioners

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18807

L. K. PETERSON, ET AL.,

Appellants,

versus

HERBERT E. THARP,

Appellee.

Appeal from the United States District Court of the Southern District of Texas:

(February 1, 1962)

Before TUTTLE, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

HUTCHESON, Circuit Judge: This case arose as a suit for an accounting by plaintiff Tharp against his partner, defendant Peterson, and certain corporate defendants owned solely by Peterson. Tried to the court on jury waiver on charges of fraud and overreaching, there was a judgment for plaintiff against defendants for the sum of $82,607.42, and defendants appealed.

Tharp and Peterson entered into a written partnership agreement on August 7, 1946, for the purpose of engaging in the small loan business. The business commenced under

the name of Modern Finance Company in Houston, Texas and was later changed to Model Investment Company. The partners formed two small loan companies in Houston, Eagle Investment Company and Triangle Loan Service, and until about June, 1952, when he withdrew, one Roy Reeves was also a partner in Eagle and Triangle. Tharp and Peterson also operated certain loan companies in Birmingham, Alabama as a partnership. As of December 31, 1952, Tharp and Peterson had a swap-out whereby Tharp acquired the Birmingham properties. Peterson acquired Eagle and Triangle, and the partnership continued with respect to Model Investment Company in Houston, Texas under the supervision, management and control of Peterson.

Sounding in fraud, overreaching and breach of fiduciary obligation, the gist of plaintiff's claim was that in June, 1952, defendant Peterson, individually, opened a small loan office under the trade name of Anchor Finance Company, and, for the purpose and with the result of defrauding plaintiff, commenced to divert the partnership's customers and business to this company and convert them to his own use; that sometime in the month of August, 1953, defendant Peterson entered into a fraudulent plan and scheme to divert the partnership business and profits to his own use by establishing additional new offices and either doing business in his individual name or through three separate corporations owned by defendant Peterson, namely Credit Finance Company, Congress Investment Company, and Alamo Finance Company; that defendant Peterson carried such plan and scheme into effect; and that, because of Peterson's breach of his fiduciary duty to the plaintiff Tharp, he should be made to account for one-half of all the profits resulting from his conduct.

The prayer was for a judgment requiring the defendant Peterson and his three corporations to account for all profits resulting to the partnership business, the establish-

ment of a trust in one-half of the stock of the three corporations created by the defendant, Peterson, as the vehicles by which the partnership business was diverted and the fraud carried out. Plaintiff prayed for discovery, an accounting, dissolution of the partnership, and for the appointment of a receiver to conserve the partnership's assets.

The defenses were a general denial and four special defenses, viz., (1) that the action was barred by the two-year statute of limitations; (2) that the plaintiff had actual knowledge that the partnership business was being liquidated, and, under the facts, he "by his silence fully condoned and approved the acts of the defendant"; (3) that plaintiff received daily, weekly and monthly reports showing partial liquidation of Model and did not object thereto, and that Peterson "relied on the apparent approval by plaintiff Tharp" of his action; and that plaintiff was estopped to contend that Peterson's acts and conduct were without his knowledge and consent; and (4) "Illegality of purpose" — that business was operated "for the purpose of illegally avoiding the Constitutional and statutory provisions of law with respect to usury" and was against public policy; and a court would, therefore not require an accounting to plaintiff.

On September 8, 1960, the trial court entered an interlocutory judgment[1] which recited in substance: that the plaintiff Tharp and defendant Peterson were partners engaged in the small loan business; that defendant Peterson breached his fiduciary duty to the plaintiff and diverted the partnership business and assets to himself and to his own corporations, and that such action and conduct by Peterson constituted actual fraud upon Tharp; that plaintiff was entitled to recover twenty-five per cent of all profits and assets received by defendants resulting from the operation

[1] Tharp v. L. K. Peterson Credit Finance Co., etc., 202 F Supp 80.

of these small loan businesses; that there should be a dissolution, liquidation, and distribution of the partnership's business and assets; and that an auditor should be appointed by separate order. A formula was set forth for fixing the amount of compensation due Peterson for management, and it was ordered that Peterson be credited with all capital sums invested by him in his own corporations.

The auditor's report was duly filed, the defendants' objections thereto, with minor exceptions, were overruled and denied, and, based on full findings of fact and conclusions of law,[2] the court rendered a joint and several judgment against each of the defendants (appellants) for the sum of $82,607.42.

On numerous specifications of error, the defendants are here attacking the court's findings and conclusions as erroneous and insisting that the judgment was wrong and must be reversed. We do not think so.

The testimony was voluminous. The record is very large, and, in our opinion, the findings are fully supported thereby, and the conclusions are correct in law. It will, therefore serve no useful purpose for us to set out the evidence or to do more than, adopting the court's finding of fact and conclusions of law, to briefly state that, for the reasons hereafter stated, the district judge correctly rejected the defenses and gave judgment for the plaintiff.

Appellants' most vigorously argued defense is defense No. 4, that the business of the partnership was operated in violation of constitutional and statutory provisions of Texas law with respect to usury and was against the public policy of the state and, therefore, the recovery as to it was forbidden by law. It is sufficient to say that we agree with the district judge's conclusion of law No. 6, that the action is merely one for a partnership accounting. It does not seek

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[2] Tharp v. L. K. Peterson Credit Finance Co., etc., 202 F. Supp 80.

to enforce any illegal agreement, and the asserted defense, that the partners were engaged in an illegal transaction and, therefore, the defendant can keep, and cannot be made to disgorge, the fruits of his attempted fraud upon plaintiff, cannot be maintained.[3]

We think it is equally clear, too, that upon the district judge's findings of fact and conclusions of law, the defense of the statute of limitation was not made out. In the first place, the action being for a partnership accounting entered into by written agreement, not the two but the four year statute of limitation applies. In addition, the controversy having originated in the fraud of the defendant, limitation did not commence to run until the plaintiff became cognizant of the fraud, and under his findings and conclusions, which the record supports, the district judge correctly held that the statute of limitations had not run.

The defendants' defense No. 2, that plaintiff knew that the business was being liquidated and by his silence condoned and approved the acts of the defendant, presents only a fact question and runs directly counter to the findings of fact of the district judge and the record in the case, and, therefore, may not be maintained. The same is true of defense No. 3, the defense of estoppel, that because plaintiff was receiving reports showing partial liquidation and did not object thereto, he is estopped to contend that Peterson's acts and conduct were without his knowledge and consent. The district judge affirmatively found as a matter of fact and law to the contrary of this contention, and the findings are well supported in fact and in law.

The case having been fully tried and heard and the court having made full conclusions of law and fact, the defend-

[3] Cf. Brooks v. Martin, 69 U.S. 78, 80, Pfeuffer v. Maltby, 54 Tex. 454; DeLeon v. Trevino, 49 Tex. 68; Wegner Bros. v. E. J. Biering & Co., 65 Tex. 506; Floyd v. Patterson, 10 S.W. 526; Hall v. Edwards, 222 S.W. 167; Lewis v. Davis, 145 Texas 468, 199 S.W. (2) 146; Hall v. Hall, 326 S.W. (2) 594.

ants' effort on this appeal is nothing more than an effort to obtain a trial of the case de novo. This we will not, and cannot, permit to be done. Defendants have not shown that the findings of the district judge are clearly erroneous. We, therefore, reject the defendants' exort to obtain a new trial here, and we order the judgment.

AFFIRMED.

APPENDIX B

Herbert E. THARP, Plaintiff,

v.

L. K. PETERSON, Credit Finance Company, a corporation, and Congress Investment Company, a corporation, and Alamo Finance Company, a corporation, Defendants.

Civ. A. No. 10536.

United States District Court
S. D. Texas,
Houston Division.

Sept. 8, 1960.

On Motions for Findings and Conclusions Feb. 1, 1961.

FISHER, District Judge.

The above-entitled action came on regularly for trial before the Court without a jury on the 7th day of March, 1960, at Houston, Texas. The plaintiff appeared in person and by his attorneys and the defendants appeared in person and by their attorney. A trial by a jury was expressly waived by the respective parties and the cause was tried before the Court sitting without a jury. Witnesses on the part of plaintiff and defendants were duly sworn and examined and documentary evidence being closed and the Court having heard argument of counsel and having examined the briefs filed by the parties, and after due deliberation and study thereon is of the opinion that the plaintiff is entitled to the relief prayed for in his complaint to the extent hereinafter decreed. Accordingly, on motion of attorneys for the plaintiff it is ORDERED, ADJUDGED AND DECREED:

(1) That plaintiff Herbert E. Tharp and the defendant L. K. Peterson were equal partners and engaged in the small loan business in the City of Houston, Texas, under the firm name of Modern Finance Company, which name was subsequently changed to Model Investment Company.

(2) That defendant L. K. Peterson breached his fiduciary duty to his partner, plaintiff Herbert E. Tharp, and diverted certain partnership business and assets of Model Investment Company to himself doing business under the trade names of Anchor Finance Company and Credit Finance Service.

(3) That defendant L. K. Peterson diverted the partnership business and assets of Model Investment Company to three corporations owned by the defendant L. K. Peterson, nafnely, defendant Credit Finance Company (successor to Credit Finance Service), defendant Congress Investment Company, Inc., and defendant Alamo Finance Company, Inc. (successor to Anchor Finance Company).

(4) That said action and conduct of defendant L. K. Peterson in diverting and applying partnership assets of Model Investment Company to companies owned by defendant L. K. Peterson constituted actual fraud upon said plaintiff Herbert E. Tharp.

(5) That defendant L. K. Peterson is due to account to the plaintiff for one-half of all of the remaining assets of Model Investment Company.

(6) That defendant L. K. Peterson is due to account to the plaintiff for 25% of all the assets of Anchor Finance Company and Credit Finance Service, and 25% of all profits derived from the operation of said companies.

(7) Defendant L. K. Peterson and defendants Credit Finance Company, Congress Investment Company, Inc. and Alamo Finance Company, Inc., are due to account to the

plaintiff for 25% of all the assets and profits resulting from the operation of said defendants, Credit Finance Company, Congress Investment Company, Inc. and Alamo Finance Company, Inc.

(8) That after the auditor's report has been made, as hereinafter provided for, this Court will then fix the amount of compensation due defendant L. K. Peterson for management and operation of each of said companies herein named in Paragraph (6) and (7). If salaries and management fees, or other compensation received by defendant L. K. Peterson are more than 50% of the net profits of such companies, the Court will make such adjustment as may be necessary to conform to the Court's Judgment.

(9) That defendant L. K. Peterson is entitled to be credited for all sums invested as capital in each of the said companies hereinabove named in Paragraph 7, less whatever sums have been received by said defendant L. K. Peterson from said companies as return of capital.

(10) The Court is further of the opinion that the partnership between the plaintiff and the defendant L. K. Peterson should be dissolved and that the business be liquidated and the funds and assets thereof be distributed to the partners as herein adjudged.

(11) Three days from the date hereof counsel for the respective parties shall agree upon some Certified Public Accountant to serve as auditor. Failing to agree, counsel for the respective parties shall submit the names of two Certified Public Accountants with principal offices in Houston, Texas. The Court will then appoint an auditor delineating his duties by appropriate order, and the auditor appointed shall make his report thirty (30) days from the date of his appointment. Cost of said audit shall be taxed as court costs in this proceeding.

(12) Upon receipt of the auditor's report, or during the period of the audit, should it become the opinion of the Court that a receiver is needed to preserve and protect the assets of said partnerships, then in that event, the Court will make such appointment of a Receiver.

(13) Pending further orders of the Court, defendants are hereby enjoined and prohibited from selling, transferring, encumbering or otherwise disposing of any properties, real or personal, except upon application and approval by Order of this Court.

Jurisdiction of this cause is retained for such further orders and decrees as may be necessary and appropriate in the premises.

On Motions for Findings and Conclusions

This cause came on to be heard in the motion of the plaintiff for an order making a Findings of Fact and Conclusions of Law, and it appearing that the motion should be granted, this action having been tried by the court without a jury, I make and file the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

(1)

Plaintiff, Herbert E. Tharp, is a citizen of the State of Alabama, residing in Birmingham, Alabama. Defendant L. K. Peterson is a citizen of the State of Texas residing in Houston, and doing business in Houston as herein set forth. Defendant Credit Finance Company is a Texas corporation domiciled in Houston, Texas, incorporated February 1, 1954, formerly known as Credit Finance Service. Defendant Congress Investment Company is a Texas corporation having its principal place of business in Houston, Texas, incorporated February 1, 1954, formerly known as Eagle Investment Company. Defendant Alamo Finance Company

is a Texas corporation domiciled in Houston, Texas, incorporated on February 1, 1954, formerly known as Anchor Finance Company, all sole proprietorships owned by L. K. Peterson. Model Investment Company, formerly Modern Finance Company, was formed pursuant to a partnership agreement between defendant L. K. Peterson and plaintiff, Herbert E. Tharp, dated August 7, 1946.

(2)

The plaintiff, Herbert E. Tharp, and the defendant L. K. Peterson entered into a written partnership agreement on August 7, 1946 for the purpose of engaging in the small loan business in the City of Houston, State of Texas. The said agreement was in force and effect at all times here pertinent. The partners were to share equally in the benefits and losses of the business. The partnership conducted its small loan business under three separate trade names, viz.: Modern Finance Company, Eagle Finance Company, and Triange Finance Company. The trade name of Modern Finance Company was changed to Model Investment Company on, to wit, December 1, 1948.

(3)

On, to wit, December 31, 1952, the plaintff traded his interest in Eagle Finance Company and Triangle Finance Company of Houston, Texas to defendant L. K. Peterson in return for Peterson's interest in certain small loan businesses owned jointly by plaintiff and said defendant Peterson in Birmingham, Alabama. The agreement for exchange was dated January, 1953 but made effective December 31, 1952. Thereafter, the partnership of the plaintiff and the defendant L. K. Peterson continued to operate under the trade name of Model Investment Compa. in the small loan business in Houston, Texas. At the time the partnership began business, the defendant Peterson was placed in exclusive control of the management of

the said partnership's affairs and continued in such control at all times herein pertinent. The plaintiff, Herbert E. Tharp, resided in Birmingham, Alabama and took no part in the management of the partnership business.

(4)

The defendant Peterson represented to the plaintiff, Herbert E. Tharp, that he was conducting the said partnership business in a lawful manner and in full conformity to the requirements of the laws of the State of Texas.

(5)

On to wit, July 10, 1952, defendant L. K. Peterson opened a small loan office under the trade name of Anchor Finance Company and began diverting the customers and business of Eagle Finance Company and Model Investment Company to the defendant's own use and benefit and to the exclusion of the plaintiff. On the first day of February, 1954, the defendant L. K. Peterson incorporated said business known as Anchor Finance Company under the name of Alamo Finance Company, a corporation incorporated and existing under the laws of the State of Texas and thereafter continued to divert the customers and business of Model Investment Company to the said Alamo Finance Company, a corporation. The defendant L. K. Peterson is the legal and beneficial owner of all the stock of the said Alamo Finance Company, a corporation.

(6)

On to wit, August, 1953, defendant Peterson opened a small loan office under the trade name of Credit Finance Service which name was later changed to Credit Finance Company, and began diverting the customers and business of the partnership to his own use and benefit and to the exclusion of the plaintiff. On to wit, February 1,

1954, the defendant Peterson incorporated said business known as Credit Finance Company under the name as Credit Finance Company, Inc., a corporation and existing under the laws of Texas, and thereafter continued to divert the customers and business of the partnership to the said Credit Finance Company, Inc. The defendant Peterson is the legal and beneficial owner of all the stock of the said corporation.

(7)

On February 1, 1954, defendant Peterson incorporated defendant Congress Investment Company (formerly Eagle Finance Company), a corporation organized under the laws of the State of Texas, for the purpose of engaging in the small loan business. Defendant Peterson diverted the customers of the partnership business to the said Congress Investment Company and continued to divert the said customers of the partnership business up to the time of the filing of this suit. The defendant L. K. Peterson is the legal and beneficial owner of the stock of the said corporation.

(8)

The income to the partnership business showed a marked decrease following the diversion of customers and business from the partnership to companies owned by the defendant Peterson, while the income to the companies owned by defendant Peterson rose rapidly for the same period. Defendant Peterson caused Model Investment Company to expend large sums for advertising while instructing the personnel of said partnership to make fewer loans and to transfer customers with good credit ratings to companies owned personally by defendant Peterson. In diverting the partnership's business and customers to himself and corporations which he owned or herein set forth, the defendant

Peterson used the partnership's trained personnel, its list of customers, its office equipment, and, in many instances, the partnership's funds, all without the knowledge, consent or approval of the plaintiff, Herbert E. Tharp. The defendant Peterson did not disclose to the plaintiff, Tharp, the facts with reference to his diversion of the partnership's customers and business to himself and corporations which he owned; he did not disclose to the plaintiff, Tharp, the fact that he used the facilities of the partnership, including its trained personnel, its equipment, and its funds to divert the partnership's business to himself as aforesaid. The plaintiff, Herbert E. Tharp, had no knowledge of all these facts and was not apprised of his legal rights until sometime in November, 1956, and thereafter on to wit, February 2, 1957, the plaintiff instituted this action.

(9)

The defendant Peterson and each of the other defendants herein have excluded the plaintiff, Herbert E. Tharp, from sharing in the profits, ownership, or management of the said defendants' businesses separately and severally and have denied that the plaintiff has any interest therein.

(10)

The defendant Peterson wrongfully and in violation of his fiduciary duty withheld $6,660.14 constituting the assets of Model Investment Company to which the plaintiff was entitled, and refused to make an accounting therefor to his partner, the plaintiff, Herbert E. Tharp.

CONCLUSIONS OF LAW

(1)

The court has jurisdiction of the parties and subject matter herein.

(2)

That the defendant L. K. Peterson breached his fiduciary duty to his partner, plaintiff, Herbert E. Tharp, by diverting certain partnership business and assets of the partnership business to himself and to three corporations owned by the defendant, namely: defendant Credit Finance Company (successor to Credit Finance Service), defendant Congress Investment Company, Inc., and defendant Alamo Finance Company, Inc. (successor to Anchor Finance Company).

(3)

That the said action and conduct of the defendant L. K. Peterson in diverting the partnership's business and assets to himself and to defendant corporations which were owned by him, constituted a breach of trust and an actual fraud upon the plaintiff, Herbert E. Tharp. That the defendants are due to account to the plaintiff in accordance with the provisions of the judgment rendered by this court on the 22nd day of December, 1960.

(4)

The plaintiff's cause of action is not barred by the statute of limitations.

(5)

The plaintiff is not guilty of laches.

(6)

This is an action for a partnership accounting. This action does not seek to enforce any illegal agreement and the asserted defense that the partners were engaging in an illegal transaction cannot be sustained.

(7)

The plaintiff is entitled to a dissolution of partnership and he is also entitled to the appointment of a receiver in the event the defendants fail to pay the judgment rendered by this court on December 22, 1960 in accordance with the terms thereof.

APPENDIX C

Title 28 United States Code, Section 1254 (pertinent portion only is set forth):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

APPENDIX D

Texas Constitution:

Article XVI

"Sec. 11. All contracts for a greater rate of interest than ten per centum per annum, shall be deemed usurious, and the first Legislature after this amendment is adopted, shall provide appropriate pains and penalties to prevent the same; but when no rate of interest is agreed upon, the rate shall not exceed six per centum per annum."

Revised Civil Statues of Texas

Article 5069

"'Interest" is the compensation allowed by law or fixed by the parties to a contract for the use of forbearance or detention of money; "legal interest" is that interest which is allowed by law when the parties to a contract have not agreed upon any particular rate of interest; and "conventional interest" is that interest which is agreed upon and fixed by the parties to a written contract, not to exceed ten per cent per annum. "Usuary" is interest in excess of the amount allowed by law; all contracts for usuary are contrary to public policy and shall be void."

Article 5070

"When no specified rate of interest is agreed upon by the parties, interest at the rate of six per cent per annum shall be allowed on all written contracts ascertaining the sum payable, from and after the time when the sum is due and payable; and on all open accounts, from the first day of January after the same are made."

Article 5071

"The parties to any written contract may agree to and stipulate for any rate of interest not exceeding ten per cent per annum on the amount of the contract; and all written contracts whatsoever, which may in any way, directly or indirectly, provide for a greater rate of interest shall be void and of no effect for the amount or value of the interest only; but the principal sum of money or value of the contract may be received and recovered."

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Petition for Writ of Certiorari was made upon W. Ervin James, c/o Hofheinz, James and Burns, 11th Floor, South Coast Building, Houston 2, Texas, and also upon Thomas E. Skinner, c/o Wilkinson and Skinner, First National Bank Building, Birmingham, Alabama, by mailing, with sufficient postage in each instance, to their said addresses respectively.

.....

William H. Scott, Jr.

Office-Supreme Court, U.S
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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 336

L. K. PETERSON,
CREDIT FINANCE COMPANY,
CONGRESS INVESTMENT COMPANY, INC.
AND ALAMO FINANCE COMPANY, INC.

Petitioners,

v.

HERBERT E. THARP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT HERBERT E. THARP IN OPPOSITION

W. ERVIN JAMES
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Counsel for Respondent

Of Counsel:

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GOBS PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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In The

Supreme Court of the United States

October Term 1962

No. 336

L. K. Peterson,
Credit Finance Company,
Congress Investment Company, Inc.
and Alamo Finance Company, Inc.
Petitioners,

v.

Herbert E. Tharp,
Respondent.

On Petition For A Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit.

BRIEF OF RESPONDENT HERBERT E. THARP IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported in 299 F. 2d 434 and is printed in full as Appendix A to the Petition. The District Court's opinion appears in 202 F. Supp. 80 and is printed as Appendix B to the Petition.

JURISDICTION

This Court is without jurisdiction, the petition for writ of certiorari not having been filed within the period allowed by law. Title 28, United States Code, Sec. 2101(c), appended hereto as Appendix A.

QUESTIONS PRESENTED

1. Whether a managing partner, who has defrauded his absentee partner, may assert the illegality of some of the transactions of the partnership (lending of money at usurious rates) and defeat a suit for an accounting by the absentee partner, thereby permitting the fraudulent partner to reap the benefits of his own fraud and breach of fiduciary duty, where the partnership agreement was legal upon its face, the transactions have become accomplished facts, and the court, in order to do equity between the partners, was not required to enforce or examine into such transactions.

2. Whether a managing partner, who has violated his fiduciary obligation to his absentee partner by organizing competing companies solely owned by the managing partner and by financing and establishing such competing companies by fraudulently transferring assets, customers and personnel of the partnership thereto, may, seven days after suit is filed by absentee partner for an accounting, terminate such partnership and, by reason of such termination, retain all profits of such competing companies accruing during the three and one-half year pendency of such suit, and be made to disgorge and share with the absentee partner only those profits which had accumulated prior to the date of such termination.

3. Whether the Supreme Court, in the absence of a conflict between decisions or other showing of public importance of issues involved, should review the evidence and findings and conclusions of the District Court, sitting without a jury, concurred in by the Court of Appeals, to determine a fact question as to knowledge by Tharp in December, 1953, of liquidation and diversion of partnership business, particularly in the light of the failure of Petitioners to point out to the Court the consequences of such knowledge.

4. Whether the Supreme Court, in the exercise of its power of supervision, should review the evidence, findings and conclusions of the District Court, sitting without a jury, concurred in by the Court of Appeals, to determine a mixed question of law and fact as to the correctness of an award for damages in a suit for an accounting which was based upon the report of a special master made pursuant to directions of the District Court.

COUNTERSTATEMENT OF THE CASE

This is a diversity case and arose as a suit for an accounting by an absentee partner, Herbert E. Tharp, against his managing partner, L. K. Peterson and certain corporate defendants wholly owned by Peterson. The complaint sounded in fraud and breach of fiduciary obligations and was tried to the District Court without a jury, and resulted in a judgment for Tharp against Peterson and the companies owned by him for the sum of $82,607.42, and, on appeal to the United States Court of Appeals for the Fifth Circuit, the judgment was affirmed.

Tharp and Peterson operated several loan companies under a written partnership agreement, with Peterson managing the companies in Houston, Texas, and Tharp operating certain companies owned by the partnership in Birmingham, Alabama. As of December 31, 1952, the partners agreed upon a swap-out whereby Tharp acquired the Birmingham properties, and Peterson became the owner of the Houston companies, with the exception of Model Investment Company in Houston, Texas which continued to be operated under the partnership agreement under the supervision and control of Peterson.

On September 8, 1960, the trial court entered an interlocutory judgment in which he found that Peterson had breached his fiduciary duty to Tharp and diverted partner-

ship business and assets to himself and to his own corporations, and that such action and conduct of Peterson constituted actual fraud upon Tharp. The Court adjudged that Tharp was entitled to recover twenty-five percent of all profits and assets received by Peterson and the corporate defendants resulting from the operation of the small loan businesses; that there should be a dissolution, liquidation and distribution of the partnership's business and assets; and that an auditor should be appointed to effect an accounting between the parties. The Court also set forth a formula for fixing the amount of compensation due Peterson for management. Peterson was also to be given full credit for all capital sums invested by him in his own corporations.

The auditor's report was filed and, with minor exceptions, the defendants' objections thereto were overruled and denied. The District Court made full findings of fact and conclusions of law and the Court of Appeals, in affirming, found that the findings were fully supported by the evidence and the conclusions correct in law.

ARGUMENT

This cause was argued and submitted on November 16, 1961. The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was rendered on February 1, 1962, and all counsel of record were advised of the opinion by form letter from the Clerk on the same date. A timely petition for rehearing was filed by L. K. Peterson, et al., (petitioners here) and the order of the Court of Appeals denying said petition was duly entered on March 15, 1962. Through inadvertence, the form letter advising counsel of the action of the Court of Appeals (while being mailed on March 15, 1962) was dated *May* 15, 1962. Thereafter, on April 10, 1962, a certified copy of the judgment of the Court of Appeals issued to the clerk of the United States District Court at Houston, Texas,

as and for the mandate, with copies of the letter of transmittal being mailed to all counsel of record on the same day, to-wit, April 10, 1962. (See certificate of the Clerk of the United States Court of Appeals for the Fifth Circuit attesting to clerical error, which is Appendix A of this brief in opposition).

The petition for writ of certiorari was filed in this Court on August 13, 1962, more than ninety days after the entry of the order of the Court of Appeals denying petition for rehearing. Indeed, said petition was filed more than ninety days from the date of issuance of the mandate, namely April 10, 1962, and the period for applying for a writ of certiorari has not been extended by a Justice of this Court.

It appears, therefore, that Petitioners' application for a writ of certiorari is out of time and should be denied. *Polleys and others* v. *Black River Imp. Co.* 113 U.S. 81, 5 S. Ct. 369; *Toledo Scale Co.* v. *Computing Scale Co.* 261 U.S. 399, 43 S. Ct. 458; *Commissioner of Internal Revenue* v. *Bedford's Estate*, 325 U.S. 283, 65 S. Ct. 1157; *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.* 344 U.S. 206, 73 S. Ct. 245.

The error of the typist in the office of the Clerk of the Court of Appeals, dating a form letter *May* 15, 1962 instead of *March* 15, 1962, could not disturb or revise the legal rights and obligations which had been plainly and properly settled with finality. Especially is this true in the light of the prompt mailing on *March* 15, 1962 of the notice of denial of the petition for rehearing, and the prompt notification to all parties of the issuance of the mandate on April 10, 1962. See *Link* v. *Wabash Railroad Company*, 82 S. Ct. 1386, 1390-1391 and footnotes contained therein and *Union Nat. Bank of Wichita, Kansas* v. *Lamb*, 337 U.S. 38, 40, 69 S. Ct. 911, 912. Cf. *Boylan et al* v. *U. S.* 257 U.S. 614, 42 S. Ct. 113.

No showing has been made by Petitioners that the decision of the Court of Appeals is in conflict with the decision of any other court, nor has it been demonstrated that there are any matters of public importance involved in the issues decided.

Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it, *Southern Power Co.* v. *North Carolina Pub. Serv. Com.*, 263 U.S. 508, 44 S. Ct. 164, 68 L. Ed. 413; *United States* v. *Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 69 L. Ed. 925, and concurrent findings by District Court and Court of Appeals are final on review by the Supreme Court in absence of very exceptional showings of error and will not be disturbed unless plainly without support. *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 68 S. Ct. 1454, 92 L. Ed. 1911, *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 689. Moreover, as the Supreme Court stated in *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 at 674, 70 S. Ct. 876 at 880, ". . . we do not reexamine the local law as applied by the lower courts". And since the findings, in this diversity case, as to the Texas law were made by a federal district judge from the Texas bar (Judge Joe Fisher), and affirmed in an opinion by a Court of Appeals Judge from the Texas Bar (Judge Joseph C. Hutcheson, Jr.), special weight should be given to their statements as to what the Texas law is. *Bernhardt* v. *Polygraphic Company of America*, 350 U.S. 198, 204, 76 S. Ct. 273, 277. See also *Propper* v. *Clark*, 337 U.S. 472, 487, 69 S. Ct. 1333, 1342, 93 L. Ed. 1480; *McGregor* v. *State Mut. Life Assur. Co. of Worcester, Mass.*, 315 U.S. 280, 62 S. Ct. 607, 86 L. Ed. 864. In *MacGregor*, the lower courts had no decision of the state courts upon which to rely in construing the relevant state stautes and none was brought to the attention of this Court. This Court affirmed in a per curiam opinion

and observed: "In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Mishigan". 315 at 281, 62 S. Ct. at 607. See also *U. S.* v. *Durham Lumber Co.*, 363 U.S. 522, 526-527, 80 S. Ct. 1282; 1284.

In the instant case, the lower courts were not without guidance from the decisions of the Texas court, as well a leading case of the Supreme Court of the United States, in concluding that the defense of illegality was not available to deny a partnership accounting to one who had been defrauded by his partner. In upholding the district judge's conclusions, the Court of Appeals held that the suit for an accounting did ". . . not seek to enforce any illegal agreement, and the asserted defense, that the partners were engaged in an illegal transaction and, therefore, the defendant can keep, and cannot be made to disgorge, the fruits of his attempted fraud upon plaintiff, cannot be maintained", 299 F. 2d 434 at 436-437, citing *Brooks* v. *Martin*, 2 Wall. 70, 69 U.S. 732; *Pfeuffer* v. *Malthy*, 54 Tex. 454; *DeLeon* v. *Trevino*, 49 Tex. 88; *Wegner Bros.* v. *E. J. Biering & Co.*, 65 Tex. 506; *Floyd* v. *Patterson*, 72 Tex. 202, 10 S.W. 526; *Hall* v. *Edwards*, Tex. Com. App. 222 S.W. 167; *Lewis* v. *Davis*, 145 Tex. 468, 199 S.W. 2d 146; *Hall* v. *Hall*, Tex. Civ. App. 326 S.W. 2d 594.

Petitioners cite the case of *Wiggins* v. *Bisso*, (Tex. S. Ct.) 47 S.W. 637, in support of their assertion that the defense of illegality could defeat Respondent's claim in a suit for an accounting. Petitioners have misread the case. In *Wiggins*, the contract was *illegal upon its face*. As the Court correctly stated:

> "To give relief to Bisso, the court must examine each of the transactions which the partnership had with the other people under the unlawful agreement entered into with the brewing company, and thus the

> court would be engaged in the examination of the unlawful acts of these parties in order to do equity between them". 47 S.W. at 638.

Citing *DeLeon* v. *Trevino*, (Tex. Sup. Ct.) 49 Tex. 88, and *Brooks* v. *Martin*, 2 Wall. 70, 69 U.S. 732, the court continued:

> "There can be no doubt that where parties have jointly, in the pursuit of an illegal purpose, acquired money, and invested that money in property which is in the possession of one of the joint owners, *such possessor cannot resist the claim of the other on the ground of the illegality of the business in which the money was first acquired*". (emphasis added) 47 S.W. at 639.

As the Supreme Court of Texas later stated in *Pfeuffer* v. *Maltby*, (Tex. Sup. Ct.), 54 Tex. 454, 461:

> "Whether the contract of partnership, at the time it was formed and entered upon by the parties, was illegal and void as against public policy, is not necessarily the controlling question; but *the true inquiry is, whether a party to that contract is liable or not, in an action against him, brought by his former partner, to recover from him his share of the proceeds of the partnership*" (emphasis added).

Similarly, Petitioners' reliance upon *Araiza* v. *Chapa* (Civ. App. 1958), 319 S.W. 2d 742, ref. n.r.e. is misplaced. That was a case where the court was called upon to enforce a contract between partners which was illegal upon its face.

The case of *Lewis* v. *Davis* (Tex. Sup. Ct.) 199 S.W. 2d 146, is in accord with the contentions of Respondent that the defense of illegality is not available to Petitioners. In *Lewis*, the Supreme Court of Texas cited with approval the cases of *Pfeuffer* v. *Maltby*, (Tex. Sup. Ct.) 54 Tex. 454; *DeLeon* v. *Trevino*, (Tex. Sup. Ct.) 49 Tex. 88; and *Brooks* v. *Martin*, 2 Wall. 70, 69 U.S. 732.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

W. Ervin James
1107 South Coast Bldg.,
Houston 2, Texas
Counsel for Respondent

Of Counsel:

Carl Hendrix

Hofheinz and James
1107 South Coast Bldg.,
Houston 2, Texas

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Brief of Respondent in Opposition was made upon William H. Scott, Jr., 725 Bankers Mortgage Building, Houston 2, Texas, and also upon Ellis F. Morris, American Investors Building, Houston 2, Texas, by depositing the same in the United States Post Office with first class postage prepaid to their said addresses, respectively, this 11th day of September, 1962.

.....

W. Ervin James

APPENDIX A

Title 28, United States Code, Section 2101(c):

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

APPENDIX B

CERTIFICATE ATTESTING TO CLERICAL ERROR

I, Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that I am the custodian of the records of said Court and that the following clerical error occurred in the preparation of the routine notice of the Court's order denying petition for rehearing in the case of *L. K. Peterson, et al.* v. *Herbert E. Tharp*, No. CA 18,807.

This Court's judgment in the above case was entered February 1, 1962. Petition for rehearing was timely filed by Appellant and the Court's Order denying said petition for rehearing was duly entered on March 15, 1962. All counsel of record were notified of the entry of said Order by a mimeographed letter which carried a facsimile of the signature of the Clerk. Through inadvertence the date of *May* 15, 1962, was entered on said form notice instead of *March* 15, 1962. I am advised and believe, and therefore allege, that said notices were timely mailed on March 15, 1962. On April 10, 1962, a certified copy of the judgment of this Court issued to the Clerk of the United States District Court at Houston, Texas, as and for the mandate, with copies of the letter of transmittal being mailed to all counsel of record in this cause pursuant to the usual practice on that same day, to-wit, April 10, 1962.

Done this 20th day of August, 1962.

/s/ EDWARD W. WADSWORTH
Edward W. Wadsworth, *Clerk*

Test:

/s/ EDWARD W. WADSWORTH
Edward W. Wadsworth
Clerk, U. S. COURT OF APPEALS,
FIFTH CIRCUIT, NEW ORLEANS,
LOUISIANA

August 20, 1962